Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DAYTON NEWSPAPERS, INC.,
Petitioner,

v.

GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 957, affiliated with the International Brotherhood of Teamsters, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991) determined that a post expiration grievance must be arbitrated merely where it involves "facts and occurrences that arose before expiration," without the additional requirement imposed in *Litton* of either an "accrued or vested" right, or a contractual right that "survives expiration of the remainder of the agreement."

II. Whether the Sixth Circuit Court of Appeals misinterpreted and misapplied *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991) to require arbitration where there are "facts and occurrences" that arose prior to expiration, but no "accrued or vested" rights, or surviving contractual rights.

III. Whether the Sixth Circuit Court of Appeals erred by reversing the district court's ruling that Petitioner, Dayton Newspapers, Inc., did not have an obligation to arbitrate the second termination of an employee based upon its post-expiration determination that he was an unacceptable liability risk.

PARTIES TO THE PROCEEDING

Petitioners

Dayton Newspapers, Inc. is not a subsidiary or affiliate of a publicly-owed corporation. There is no publicly-owned corporation that has a financial interest in the outcome of this matter. Dayton Newspapers, Inc. is a subsidiary of Cox Newspapers, Inc. Cox Newspapers, Inc. is a subsidiary of Cox Enterprises, Inc.

Respondents

General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957 is affiliated with the International Brotherhood of Teamsters.

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The Petition Should Be Granted Because Federal Courts Have Misinterpreted and Misapplied the Court's Ruling in Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991), as Requiring Parties to Arbitrate a Post-Expiration Grievance Where it Merely "Involves Facts and Occurrences That Arose Before the Expiration," Without the Additional Requirement Imposed in Litton of Either an "Accrued or Vested" Right, or a Contractual Right That "Survives Expiration of the Remainder of the Agreement." 8

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit dated December 4, 2003 is included in the Appendix at Appendix A at 1a-7a. The Opinion of the United States District Court for the Southern District of Ohio denying the Respondent's Motion to Amend or Modify is unreported and included in the Appendix at Appendix C at 13a-15a. The Opinion of the United States District Court for the Southern District of Ohio, Western Division is unreported and is included in the Appendix at Appendix B at 8a-12a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on December 4, 2003. This Petition for Writ of Certiorari is filed within 90 days of the Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act
9 U.S.C. § 10(a)(4)

§ 10. Same; vacation; grounds; rehearing

STATEMENT OF THE CASE

The Petitioner, Dayton Newspapers, Inc. ("DNI") is not obligated to arbitrate the second termination of Rick Elliott ("Elliott"), a former employee of DNI under an expired Collective Bargaining Agreement. As determined by the District Court, Elliott's termination was based upon a post-

expiration determination that he was an unacceptable liability risk to the *future* operations of DNI. See App. B and C.

The evidence at the hearing established that Elliott, a member of Respondent, General Truckdrivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957 ("the Union"), was a Branch Captain, a supervisory employee in charge of DNI's Beavercreek Circulation branch. During his shift, he was the sole person charged with supervising the morning distribution of newspapers to approximately one hundred (100) carriers. On February 24, 1996, Elliott physically grabbed Iris Thomas ("Thomas"), a newspaper carrier and independent contractor for DNI, as she was leaving DNI's Beavercreek Distribution Branch, where both were working. This occurred during a confrontation between Elliott and Thomas, who were engaged in an extra-marital relationship. The Arbitrator found in his decision that Elliott approached Thomas from behind *as she was leaving the building*, grabbed her by the back of the neck and took her out the door, holding her by her hair. Unrefuted evidence was also presented at hearing that as Elliott grabbed Thomas' neck, he loudly and angrily called her a "bitch".

DNI terminated Elliott's employment as punishment for inflicting violence upon and verbally abusing Thomas, a co-worker with whom he was having an extra-marital affair. Pursuant to a collective bargaining agreement ("CBA"), Elliott filed a grievance contesting his termination. The grievance proceeded to arbitration on September 20, 1996 and the Arbitrator issued an award in favor of Elliott on December 19, 1996 ("the Arbitration Award"). This decision was received by DNI on January 2, 1997. The Arbitrator determined that DNI did not follow predisciplinary procedures and did not have just cause for terminating Elliott.

On March 22, 1996, Elliott filed an application with the Ohio Bureau of Employment Services ("OBES") for unemployment compensation. After a hearing on June 27, 1996, the OBES ruled on July 3, 1996 that Elliott was discharged by DNI *for just cause* in connection with work. The Hearing Officer stated that the evidence established that as Thomas was leaving DNI's Beavercreek Distribution Branch, Elliott, acting in his supervisory capacity, *grabbed her by the hair on the back of her head*, and that this constituted just cause for Elliott's termination.

Subsequent to receiving the Arbitration Award and the expiration of the CBA, DNI analyzed its exposure to liability if it were to retain Elliott as an employee, the risk of harm he posed in the workplace, the *future* corporate liabilities at stake and its obligation to provide a safe non-hostile, working environment, and decided to reinstate Elliott pursuant to the Arbitrator's Award, but to subsequently discharge him. It is undisputed that this decision was made *subsequent to the expiration of the CBA* on December 27, 1996. On January 27, 1997, the parties met and DNI reinstated Elliott pursuant to the Arbitrator's Award, while reserving its right to challenge that award, then discharged Elliott as an unacceptable liability risk. During the meeting, DNI stated that Elliott was not being discharged the second time in order to discipline him, but pursuant to DNI's legal determination that he was an unacceptable liability risk for the company. DNI's decision was based on DNI's judgment that, as of January 27, 1997 and looking forward, the law on January 27, 1997 in Ohio with regard to negligent retention was such that DNI would or could face *future* significant potential liabilities, e.g. a claim for negligent retention, if it did not terminate Elliott. The second termination did not involve any violation of any rules under the old collective bargaining agreement. The Union filed charges with the NLRB

regarding Elliott's second termination, claiming that since Elliott had not committed any further misconduct, there could not be "just cause' and the discharge violated the terms of the expired contract. The NLRB refused to issue a complaint with regard to this charge. [1]

On March 24, 1997, DNI filed a Motion To Vacate or Modify Arbitration Award in the Common Pleas Court of Montgomery County, Ohio. The Union subsequently initiated a separate Complaint the United States District Court for the Southern District of Ohio ("the District Court") seeking to enforce the Arbitration Award. The Union removed this action to the District Court on April 23, 1997. The two actions were consolidated by Order of the Court on September 3, 1997. On February 23, 1998, the District Court entered a Decision and Order, and a Judgment, granting DNI's Motion for Summary Judgment, denying the Union's Motion for Summary Judgment and vacating the Arbitration Award. On March 9, 1998, the Union filed a Motion to Alter or Amend Judgment. On April 21, 1998, the District Court denied this Motion.

On April 29, 1998, the Union filed its Notice of Appeal to the Sixth Circuit Court of Appeals ("Sixth Circuit") from the District Court's grant of summary judgment to DNI and the District Court's denial of the Union's Motion to Alter or Amend Judgment. On August 19, 1999, the Sixth Circuit reversed the Decision and Order of the District Court and

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[1] At all times since the last contract expired on December 26, 1996, the Union has been free to strike over the Elliott terminations, and, in fact, one unit of the Union did strike DNI in June of 1999, in substantial part because of DNI's refusal to continue signing collective bargaining agreements containing arbitration provisions.

remanded the matter for further proceedings on the issue of back pay and the issue of *whether DNI was obligated to arbitrate the second discharge of Elliott*. See General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957 v. Dayton Newspapers, Inc., 190 F3d 434 (6th Cir. 1999).

By Decision and Order filed November 15, 2000, the District Court ruled that the back pay due Elliott shall be reduced by interim earnings and that DNI was not required to submit the second termination of Elliott to arbitration. On November 30, 2000, the Union filed a Motion to Alter or Amend Judgment. By Decision and Order filed January 5, 2001, the District Court denied the Union's Motion to Alter or Amend Judgment. The Union filed its Notice of Appeal on February 2, 2001.

On December 4, 2003, the Sixth Circuit reversed the District Court's determination that DNI was not obligated to arbitrate the second termination of Elliott. It is from this judgment that DNI petitions for a writ of certiorari.

ARGUMENT FOR GRANTING WRIT

In Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991), the United States Supreme Court held:

1) parties are only required to arbitrate post-expiration grievances where, under the CBA, there are "vested or accrued" rights, *or* ongoing contractual obligations expressed in the CBA (as opposed to by force of law); and

2) that an employer that laid-off union employees after the expiration of a Collective Bargaining

> Agreement based upon the employee's *existing* "aptitude and ability" was not required to arbitrate a grievance of such actions under the expired agreement because such evaluation of ongoing factors did not "arise" under the expired contract such that arbitration could be compelled.

Id. at 209-10.

In the instant case, Appellee, DNI, terminated Elliott based upon its evaluation of his propensities and suitability for continued employment at DNI on a *future* basis. The record is uncontroverted that such assessment and the subsequent termination occurred *after* the expiration of the parties' Collective Bargaining Agreement. Thus, under the holding of Litton, the District Court properly determined that DNI was not required to arbitrate this termination of Elliott.

However, the Sixth Circuit reversed the District Court on the basis that under its interpretation of Litton, parties are required to arbitrate any grievance that "involves facts or occurrences" that arose before expiration. App. A. This decision is contrary to both holdings in Litton. A review of Litton shows that the *only* circumstances under which actions are deemed to "arise" from an expired CBA are where 1) an action taken after expiration infringes a right that "accrued or vested" under the agreement, or 2) under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. The assessment by DNI as to Elliott's future suitability for continued employment and subsequent termination of Elliott are not subject to the arbitration provisions of the expired CBA. Clearly, Elliott's continued and future employment is not a right that vested under the CBA and the CBA does not provide, under normal principles of contract interpretation,

that such matters would survive the expiration of the CBA. Accordingly, under the Litton decision, DNI's actions do not arise from the expired CBA such that its arbitration provisions are controlling.

To the contrary, the *only* evidence in the record is that DNI evaluated Elliott's suitability for continued employment in the context of Ohio's body of law relating to the negligent *retention*, i.e. the continued, future employment of employees known to have criminal or dangerous propensities. There is *no* evidence that such assessment was not made, that such assessment was not made *after* the expiration of the CBA or that the assessment was without merit, particularly in light of the Ohio Bureau of Employment's determination that Elliott *grabbed Thomas by her hair* on the back of her head *as she was leaving*.

It should be noted that the merits of DNI's assessment are *not* at issue before the Court. The issue before the Court is whether arbitration is required to be the *forum* in which the merits of DNI's actions could be assessed. Again, under this Court's authority of Litton, DNI's assessment of Elliott's *future* suitability and resulting termination are *not* subject to the arbitration provisions of the expired CBA.

Because the Sixth Circuit has misinterpreted and misapplied the Litton decision in a manner that leads to results that are completely inconsistent with and effectively overturns the Litton holding, DNI respectfully requests that the Court grant its Petition for a Writ of Certiorari in this case.

ARGUMENT 1

The Petition Should Be Granted Because Federal Courts Have Misinterpreted and Misapplied the Court's Ruling in Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991) as Requiring Parties to Arbitrate a Post-Expiration Grievance Where it Merely "Involves Facts and Occurrences That Arose Before Expiration," Without the Additional Requirement Imposed in Litton of Either an "Accrued or Vested" Right, or a Contractual Right That "Survives Expiration of the Remainder of the Agreement."

In Litton Financial Printing Division, 501 U.S. 190 (1991), the Court held that after the expiration of a collective bargaining agreement ("CBA"), grievances are only arbitratable under two circumstances:

1) "if they involve rights which accrued or vested under the Agreement; or

2) "[if they involve] rights which carried over after expiration of the Agreement, not as legally imposed terms and conditions of employment but as continuing obligation under the contract.

Id. at 209. Unfortunately, based upon other language contained in the decision, federal courts have expanded Litton to provide a *third* exception where parties must arbitrate post-expiration grievances, i.e., where it merely involves "facts and occurrences" that arose before expiration. As set forth below, this sweeping "facts and occurrences" exception was clearly not contemplated by the Litton decision, and in fact in this case contradicts that decision. The ruling in Litton does

not hold that grievances must be arbitrated if there are facts that arose *during* the contract, it holds that parties must arbitrate disputes arising *under* the contract. Litton, 501 U.S. at 205. Thus, only where there are "vested or accrued" rights, *or* contractual obligations that *expressly* survive expiration of the contract (as opposed by operation of law) will arbitration be required, not merely where the grievance involves "facts or occurrences" that arose before expiration.

A. Litton and its Background

The United States Supreme Court has stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986) (internal quotation marks and citation omitted). Such issues of interpretation regarding arbitrability are properly decided by the courts. See id. at 649.

In 1970, the National Labor Relations Board ("NLRB") held that an arbitration clause generally does *not* continue in effect after the expiration of a collective bargaining agreement. See Hilton-Davis Chem. Co.,185 NLRB 241, 242, 1970 WL 25333 (1970).[2]

The Court, however, has created an exception to this general rule where a dispute has its "*real source in the contract.*" See Litton, 501 U.S. at 205. In Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977), the parties' collective bargaining

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[2] The NLRB's holding was subsequently adopted by the Court in Litton, 501 U.S. at 200 (1991).

agreement, which contained a binding arbitration clause, "was to remain in effect until July 21, 1973, and thereafter, until such time as either a new agreement was executed between the parties, or the existing agreement was terminated . . . by either party." Id. at 246. The union took the appropriate steps to terminate the agreement as of August 27, 1973. Four days after the agreement's termination, the company closed the plant due to the union's threat to strike. The company then failed to pay the employees any severance pay and declined to arbitrate the matter on the ground that its obligation to arbitrate terminated along with the collective bargaining agreement. Id.

Contrary to the Nolde Brothers' position, the Supreme Court held that the termination of a collective bargaining agreement does not automatically extinguish a party's duty to arbitrate a grievance that "*arises under the contract.*" See id. at 251. Because the dispute arose under the contract — it directly involved a *vested and accrued right*, severance pay, pursuant to the expired agreement — the Court held that the dispute was subject to resolution under the agreement's arbitration terms. *Id.* at 253-55

Subsequently, the Supreme Court addressed a similar issue in Litton where the company laid off 10 workers almost one year after the expiration of the parties' collective bargaining agreement. The union sought to arbitrate its grievance of these terminations on the basis of the arbitration clause contained within the expired agreement. In rejecting the union's position, the Court explained that the presumption in favor of arbitration as set forth in Nolde Brothers only applied when the dispute has its "*real source in the contract.*" Litton, 501 U.S. at 205 (emphasis added). It then set forth the following situations when a dispute would be deemed to arise under a contract:

1) "if they involve rights which accrued or vested under the Agreement; or

2) "[if they involve] rights which carried over after expiration of the Agreement, not as legally imposed terms and conditions of employment but as continuing obligation under the contract.

Id. at 209. The Court then held that the company was not obligated to arbitrate the layoff grievance in question because, unlike the dispute in Nolde Brothers, it did not fit within any of the categories that would cause it to "arise under the contract." Specifically, in Litton the union filed grievances on behalf of employees that were "laid off" claiming a violation of the expired collective bargaining agreement which had provided that "in case of lay offs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." Id. at 194.

Unfortunately, the Court also phrased its holding as follows:

> A post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Id. at 205-06. It is the foregoing language that federal courts have relied upon to create the "third" exception where parties must arbitrate post-expiration grievances, i.e., where there are "facts and occurrences" that arose prior to expiration.

However, a review of both the majority and dissenting opinions in Litton reveals *numerous* instances where the only *two* exceptions regarding arbitration noted are where the right accrued or vested *or* a disputed contract right expressly survives the expiration of the CBA. Again, the Court stated:

> We apply these principles to the layoff grievances in the present case. The layoffs took place almost one year after the Agreement had expired. It *follows that the grievances are arbitrable only if they involve rights which accrued or vested under the Agreement, or rights which carried over after expiration of the Agreement*, not as legally imposed terms and conditions of employment but as continuing obligations under the contract.

Id. at 209 (emphasis added). Similarly, the Court stated:

> Exceptions are determined by contract interpretation. *Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective-bargaining agreement provides in explicit terms that certain benefits continue* after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.

Id. at 207-08. The Court again stated:

> Leaving aside the question whether a provision requiring all layoffs to proceed in inverse order of seniority would support an analogy to the severance pay at issue in Nolde Brothers, which was viewed as a form of deferred compensation, the layoff provision

> here cannot be so construed, *and cannot be said to create a right that vested or accrued during the term of the Agreement or a contractual obligation that carries over after expiration.*

Id. at 209-10. Even the dissenting opinion *expressly* recognized the *two* exceptions to the rule against post-expiration arbitration existed:

> By contrast, the majority today holds that a post-expiration grievance can be said to "arise under" the agreement only where the court satisfies itself (1) that the challenged action "infringes a right that accrued or vested under the agreement," or (2) that "under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."

Id. at 212 (J. Marshall dissenting).

As set forth below, at least one Judge in the Sixth Circuit has properly interpreted the Litton decision to mean that a post-expiration grievance can be said *only* to "arise" under an expired contract where an action taken after expiration either 1) infringes a right that accrued or vested under the agreement, or 2) where, under normal principles of contract interpretation, the disputed contracted right survives expiration of the remainder of the agreement. South Central Power Co. v. International Brotherhood of Electrical Workers, Local Union 2359, 186 F.3d 733, 742-43 (6th Cir. 1999) (J. Kennedy dissenting).

However, the majority in South Central, and the court below in this case have misinterpreted and misapplied Litton to include a third sweeping exception under which parties

must arbitrate post-expiration grievances. The Sixth Circuit, as well as other Courts have determined that where a post expiration grievance "involves facts and occurrences " that arose before expiration, *without* the express additional requirement imposed in *Litton* of either an "accrued or vested" right, or a contractual right that "survives expiration of the remainder of the agreement." See South Central, 186 F. 3d at 742-43; Trinidad Corporation v. National Maritime Union of America, 81 F. 3d 769 (8th Cir. 1996) However, these decisions are clearly contrary to the Court's holdings in *Litton*.

B. The *South Central* Decision

In South Central Power Co. v. International Brotherhood of Electrical Workers, Local Union 2359, 186 F.3d 733 (6th Cir. 1999), the Sixth Circuit applied the holding of Litton and Nolde in a case involving an employee discharge that occurred during the gap between periods covered by successive collective bargaining agreements. The district court had held that the employer, South Central, had a duty to submit the dispute to arbitration "because the facts and occurrences that lead to [the employees] termination arose before the expiration of the old agreement. Id. at 737. Recognizing that the "precise reach of the Litton test is uncertain," the Sixth Circuit drew the following conclusions from Litton and Nolde:

> (1) If *all* the facts and occurrences relating to [the employee's] termination had arisen prior to the expiration of the Old Agreement, then the parties would be bound to arbitrate, and (2) if *none* of the facts and occurrences had arisen prior to the expiration of the Old Agreement . . ., an arbitration would clearly not be required. Neither decision, however,

> answers the question of whether arbitration is required in a situation such as that presented in the instant case in which some, but not all, of the facts and occurrences arose prior to expiration of the Old Agreement.

Id. at 739 (emphasis added). The Sixth Circuit rejected South Central's argument that the only material fact or occurrence to be considered when applying the *Litton* test is the employee's discharge itself, in that "facts and occurrences" beyond the ultimate fact of discharge would also have to be considered. Id. at 739. The Sixth Circuit also rejected the union's contention that arbitration is required as long as *any* fact or occurrence arose prior to the expiration of the collective bargaining agreement. Id. at 739. The Court emphasized that the rule that parties are bound to arbitrate when a post-expiration dispute "arises from" a collective bargaining agreement constitutes *an exception* to the general principle that an obligation to arbitrate grievances does not continue after the agreement expires and that the union's interpretation created the risk of the exception swallowing the rule. Id. at 739-40.

This Court then created its own "test" for applying the "facts and occurrences" arbitration exception and held that a dispute "arises under the contract" when *a majority* of the material facts and occurrences arose before the expiration of the collective bargaining agreement. Id. at 740. The court then stated that:

> The material facts and occurrences that may be considered in making this determination include, but are not limited to, factual predicate the grievance, whether any grievance was filed or pursued, and the timing of discipline or discharge of the employee.

Id. In the instant case, the Sixth Circuit admitted that by its analysis it has created a "somewhat fuzzy boundary." App. A.

However, the well-reasoned dissent in South Central offered an interpretation of Litton consistent with that opinion *as a whole*. Specifically, the dissent stated that a complete reading of Litton indicates that the decision does *not* actually permit an exception to the rule that arbitration clauses do not survive the expiration of collective bargaining agreements *solely* because there are "facts and occurrences that arose before expiration." As noted by Judge Kennedy in his dissent in South Central:

> While the [Supreme] Court does say "[a] post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement," *Id.* at 205-06, 111 S.Ct. 2215, the Majority treats the first clause as one of three independent requirements. I believe that instead *it is a requirement of both of the following clauses*. First, the facts and circumstances must arise before expiration. When they do, then *if the right accrued or vested under the agreement or a disputed contractual right survives, the grievance arises under the contract*. Under the Majority's interpretation the word "or" rather than the comma would have to be inserted after "expiration."

> The next paragraph of the Court's opinion supports my reading. Any other reading of Nolde Brothers seems to assume that post-expiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Id. at 206, 111 S.Ct. 2215.
>
> In every case where "action taken after expiration infringes" an accrued or vested right or where a disputed contractual right survives expiration of the contract, there will be facts and circumstances that arose before expiration. To treat the first clause as an independent ground makes the second and third clauses unnecessary.

South Central, 186 F.3d at 742-43. (J. Kennedy dissenting)

Judge Kennedy's analysis is directly on point. *Litton* clearly does not contemplate a mere "facts and occurrences" exception. The language of that opinion makes this abundantly clear. Additionally, it must be remembered that the *Litton* decision created the *two* exceptions by expressly *rejecting* the notion that "post expiration terms and conditions" of "vested or accrued" rights, or rights that expressly continue under the contract *would* be giving the terms and conditions of employment "force by virtue of the contract" even where there are no "obligations already fixed under the contract but as yet unsatisfied." Thus, the creation

of this "facts and occurrences" exception clearly contradicts the legal reasoning behind the *Litton* decision.

The Court further emphasized that post expiration arbitration would only be required with regard to obligations "fixed" under the contract:

> But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract.

Id. Courts have uniformly recognized that the right to be discharged only for just cause "is strictly a creature of the collective bargaining agreement and its life as a matter of contract does not extend beyond contract expiration." International Brotherhood of Teamsters v. Pepsi-Cola General Bottlers, Inc., 958 F. 2d 1331, 1334 (6th Cir. 1992); Chauffeurs, Teamsters & Helpers, Local Union 238 v. C.R.S.T., Inc., 795 F. 2d 1400, 1404 (8th Cir.1986). However, permitting an exception based upon mere "facts and occurrences" that arose before the expiration of the contract, without the additional requirement of employment which coincides with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired." *Litton,* 501 U.S. at 206.

C. The *Litton* Opinion regarding "aptitude and ability" as "vested or accrued" rights

In considering the *two* circumstances under which parties are required to arbitrate post-expiration grievances, the Court in Litton held that *an employer's post-expiration evaluation of employment factors* at a given point in time *after* the expiration of the collective bargaining agreement was not a "vested or accrued" right "arising from" the collective bargaining agreement:

> Leaving aside the question whether a provision requiring all layoffs to proceed in inverse order of seniority would support an analogy to the severance pay at issue in Nolde Brothers, which was viewed as a form of deferred compensation, *the layoff provision here cannot be so construed, and cannot be said to create a right that vested or accrued during the term of the Agreement or a contractual obligation that carries over after expiration.*
>
> The order of layoffs under the Agreement was to be determined primarily with reference to "*other factors such as aptitude and ability.*" Only where all such factors were equal was the employer required to look to seniority. Here, any arbitration proceeding would of necessity focus upon whether aptitude and ability — and any unenumerated "other factors" — were equal long after the Agreement had expired, as of the date of the decision to lay employees off and in light of Litton's decision to close down its coldtype printing operation.
>
> The important point is that *factors such as aptitude and ability* do not remain constant, but change over

> time. They *cannot be said to vest or accrue or be understood as a form of deferred compensation.* Specific aptitudes and abilities can either improve or atrophy. *And the importance of any particular skill in this equation varies with the requirements of the employer's business at any given time. Aptitude and ability cannot be measured on some universal scale, but only by matching an employee to the requirements of an employer's business at that time.* We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration.

Id. at 210 (emphasis added).

D. DNI's Second Termination of Elliott

DNI assessed its exposure and liability in *continuing* to employ Elliott after the expiration of the CBA. This is clearly warranted under existing Ohio law.

Under Ohio law, it is clear that an employer may be held liable for *continuing* to employ a worker where that employer knew or could have discovered through reasonable investigation of that worker's dangerous propensities. Staten v. Ohio Exterminating Co. Inc., 123 Ohio App. 3d 526, 529 (1997). In order to prevail on such a claim, a plaintiff must demonstrate:

(1) the existence of an employment relationship;
(2) the employee's incompetence;
(3) the employer's actual or constructive knowledge of such incompetence;
(4) the employee's act or omission causing the plaintiff's injuries; and

(5) the employer's negligence in hiring *or retaining* the employee as the proximate cause of plaintiff's injuries.

Id. Ohio courts have specifically held that the primary issue is whether the employer knew or should have known of the employee's criminal or tortuous propensities. Plotner v. Swanton Local Board of Education, 85 F. Supp. 2d 747, 755 (N.D. Ohio 2000); Stephens v. A-Able Rents Co., 101 Ohio App. 3d 20, 26 (1995); *see also* Kerons v. Porter Paint Co., 61 Ohio St. 3d 486, 491-93 (1991) ("a claim for negligent retention may lie if the employer knew of the behavior but failed to act . . . .").[3]

Here, completely consistent with the final holding of Litton, DNI assessed that propensities of Elliott in terms of his continued employment. One could no more evaluate such risk consideration without looking at past performance, then evaluate "aptitude and ability" as was the case in Litton. If the employer's evaluation of "aptitude and ability" was not a "vested or accrued" right and did not require post-expiration arbitration based upon past "facts and occurrences" alone, clearly the grievance regarding Elliott's termination as a liability risk is not subject to arbitration as well.

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[3] It is important to this case that in analyzing an employer's liability for foreseeable harm cause by its employee, the focus is on *the employer* and "not on what the employee did." Stephens, 101 Ohio App. 3d at 26. The foreseeability depends upon the knowledge of the defendant which is determined from the totality of the circumstances. Walters v. Hawken School, 1999 WL 43326 *3 (Cuyahoga Co. Jun. 28 1999).

E. The District Court's Judgment

In the instant case, *it is uncontroverted* in the record that in January,1997, *after* the expiration of the CBA, DNI assessed the violent propensities and suitability of Elliott for continuing employment. This assessment was based, in part, upon the findings by the Ohio Bureau of Unemployment that *Elliott grabbed Thomas by the hair* on the back of her head *as she was leaving*. Thus, Thurman made a determination of Elliott's "aptitudes" and determined that he was an unacceptable liability risk as to future claims. This was recognized by the District Court in its Decision:

> Because DNI at that point in time knew that Elliott was capable of assault on a fellow employee, a subordinate with whom he had engaged in what was apparently a sexual relationship, it might reasonably fear a negligent retention claim *in the future*.

R. 55, Decision and Order, Jt. App. 60, 62 (emphasis added).

Further, as recognized by the District Court in its Decision and Order Denying Plaintiff's Motion to Amend the Judgment:

> As the Court hoped it had made clear, what the employer did after expiration of the collective bargaining agreement was to determine it no longer wished to employ Mr. Elliott, based on the fact that he had a demonstrated tendency to engage in assaultive behavior on a fellow employee which could result in the future in a further assault (on someone other than the person he fought with in the past) which would in turn generate an "unacceptable liability risk." *In other words, it was a management assessment of*

> *future risk, not punishment for past behavior.* It is correct that the sole apparent factual basis for the decision was the incident involving Iris Thomas which was the subject of the prior grievance, suit, and appeal. But this Court's decision on remand in no way "overrules" or attempts to overrule the Court of Appeals or the arbitrator. Mr. Elliott is entitled to reinstatement from the date of original termination until the second termination and back pay for the entire period. But he is not entitled to keep in perpetuity a job based on rights under the collective bargaining agreement after it expires. By analogy, if the collective bargaining agreement had continued and their had been a promotion available which under the contract was to be determined on the basis of seniority, and Mr. Elliott was next in seniority order, DNI would not have been able to deny him the promotion because of the fight he had been in. But assuming the same promotional opportunity but no CBA, there would be nothing to prevent DNI from deciding not to promote on the basis of the past incident. *The employer is not required to ignore past conduct in determining staffing for the future.* Once the CBA has expired, it is not liable to the grievance procedures with respect to that staffing.

R. 60, Decision and Order, Jt. App. 64, 64-5 (emphasis added).

The District Court's decisions, of course, are completely consistent with the United States Supreme Court holding in Litton. The Respondent has not argued and no court has found that continued employment by Elliott was either a right which "accrued or vested" under the CBA or a right "which carried over after expiration of the [CBA] . . . as continuing

obligations under the contract" because no facts exist to support such arguments. *See* Litton, 501 U.S. at 209. Again, the Court in Litton, in analyzing the two recognized arbitration exceptions, specifically recognized that "factors such as aptitude and ability do not remain constant, but change over time" and, thus, "cannot be said to vest or accrue." Similarly, the "propensities" and suitability of an employee do not vest, but can only be evaluated at any given point in time. As of January, 1997, DNI evaluated Elliott to be a future risk and unsuitable for future work at DNI.[4]

Here, as in Litton, the decision to terminate Elliott was based upon the "requirements of an employer's business *at that time*". 501 U.S. at 210 (emphasis added). Specifically, Elliott was terminated based upon DNI's judgment that, *on January 27, 1997 and looking forward*, DNI would or could face future significant potential liabilities if it did not terminate Elliott. The second termination of Elliott was not disciplinary in nature but based upon DNI's risk analysis of Elliott, the OBES's determination, the Arbitrator's findings and the state of the law in Ohio with regard to negligent retention as of January 27, 1997. The second termination did not involve a violation of any rule in the old CBA. Clearly, the Court's finding in Litton that "aptitude and ability" can only be measured "by matching an employee to the

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[4] Again, it must be remembered that the *validity* of DNI's decision is not at issue here. *See* Litton 501 U.S. at 210, n.4 ("We do not decide whether, in fact, the layoffs were out of order"). In Litton the Court further noted that the Union would remain able to argue that the [layoffs] amounted to an unfair labor practice, as a unilateral change of a term or condition of employment. Litton, 501 U.S. at 210, n.4. It should also be noted that the Union has the right to strike if it is unhappy with DNI's decision regarding Elliott.

requirements of an employer's business *at that time*" is controlling as to an employer's attempt to measure the "risks" associated with an employee on a given date and looking forward to the future. In fact, such "risk" determinations are part of evaluating an employee's "aptitude and ability".

The District Court correctly held that DNI is not required to arbitrate the post expiration grievance. Under *Litton,* DNI's assessment of Elliott after the expiration of the contract should not be analyzed under a "facts and occurrences" exception that is contrary to that opinion.

CONCLUSION

Under the Sixth Circuit where a grievance must be arbitrated when it merely *involves* "facts or occurrences" that arose prior expiration, the Court's holding in Litton regarding "aptitude and ability" would be effectively overturned. It should be noted that in Litton the employer evaluated the "aptitude and ability" of, *and laid off*, "6 of the 11 most senior employees in the plant." 501 U.S. at 194. It is patently obvious that the employer was completely aware of the "aptitude and ability" of each senior employee over their years of service while the collective bargaining agreement was in effect. However, such prior knowledge in no way prevented the Court from determining that such factors do not "vest and accrue" and may be evaluated as to an employer's requirements "at any give time" without "arising from" the period when the agreement was in place. Obviously no employer could evaluate "aptitude and ability" without assessing prior "facts and occurrences."

The reason for this incongruity is clear: Litton did not create a "facts and occurrences" exception. Other passages in the Litton decision make this clear. Equally obvious is the

fact that if a "facts and occurrences" exception was created, there would be no need for the other two exceptions. See South Central, 186 F.3d at 742-43 (J. Kennedy dissenting). [5] Thus, the Sixth Circuits creation of the sweeping "facts and occurrences" exception should be overturned.

For the reasons contained herein, DNI respectfully requests that the Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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[5] The two exceptions found in Litton are not implicated in this case. It is clear that continuing employment rights, like the layoff provisions in *Litton*, do not "vest or accrue," such as the severance payment in Nolde would. Further, there is nothing in the CBA that indicates that employment rights should survive the expiration of the CBA as a "continuing obligation."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-3114

[Filed December 4, 2003]

GENERAL TRUCK DRIVERS,CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 957, affiliated with the International Brotherhood of Teamsters, AFL-CIO,
Plaintiff-Appellant,

v.

DAYTON NEWSPAPERS, INC.,
Defendant-Appellee.

On Appeal from the United State District Court for the Southern District of Ohio.

Before: BOGGS, Chief Judge; KRUPANSKY and CLAY, Circuit Judges.

BOGGS, Chief Judge. This case comes before our court for the second time. In an earlier decision, we held that an arbitrator's award reinstating union employee Rick Elliott, because his discharge was found to be without "just cause," should not have been overturned by the district court. *See*

General Truck Drivers v. Dayton Newspapers, Inc., 190 F.3d 434 (6th Cir. 1999). Following the reinstatement that we ordered, Elliott was immediately terminated for the stated reason that the company's independent evaluation, subsequent to the arbitrator's decision and the expiration of the Collective Bargaining Agreement ("CBA"), found that Elliott could constitute a liability risk because of his past assaultive behavior. The company also refused to arbitrate the union's grievance resulting from this second termination. The company contended that this termination was based on circumstances occurring after the expiration of the Collective Bargaining Agreement, and therefore was not subject to arbitration.

The district court ultimately agreed with the company, while the union now argues that, under applicable precedent, the arbitration clause remains in effect to govern situations where the majority of the facts and circumstances relied upon took place prior to the expiration of the Collective Bargaining Agreement. We agree with the appellant, reverse the judgment of the district court, and remand for the submission of the grievance to arbitration.

I

The underlying events are set forth in detail in our previous decision. 190 F.3d at 435-37. In sum, on February 24, 1996, Elliott was involved in an altercation at work with a co-worker, not his wife, with whom he was having a "personal relationship." There were various witnesses to the scene, who gave somewhat differing accounts as to who instigated the altercation and how serious it was. Elliott was terminated a month later for "physical abuse of a co-worker." However, after a grievance process and arbitration, Elliott was ordered reinstated. The arbitrator found that the

altercation did not constitute "workplace violence" and therefore did not furnish "just cause" for the dismissal. In particular, the arbitrator relied on his assessment of the facts, which led to the conclusion that Elliott was as much the victim as the instigator of the altercation.

While the grievance process proceeded, Elliott had sought unemployment compensation. On July 3, 1996, the Ohio Unemployment Compensation Board found that Elliott was not entitled to unemployment insurance because his firing was justified. This decision was rendered well before the arbitrator's hearing that was held on September 20.

The arbitrator ordered Elliott reinstated on December 19, 1996, but, the company contends that, for whatever reason, it did not receive the decision until early January, after the CBA expired on December 26, 1996. The company waited a few days and then informed Elliott that he would be reinstated, but in the same letter summoned him to a meeting on January 27, 1997, at which meeting he was fired.

The company has submitted affidavits from its General Counsel stating that this firing was "pursuant to DNI's legal determination that he was an unacceptable liability risk for the company" and not for the purpose of disciplining Elliott. The union again sought arbitration on Elliott's behalf, but the company refused. After the union sought relief in the United States District Court for the Southern District of Ohio, the company's refusal to arbitrate was upheld. The question before us now is whether the company is required to arbitrate Elliott's second grievance, in accordance with the terms of the expired CBA, or whether the second termination was sufficiently independent of the first that the obligation to arbitrate does not persist past the expiration of the CBA.

II

As a general proposition, most terms of an expired CBA remain in effect, pending the negotiation of a new contract or the breaking off of a representation relationship, but this general principle does not universally apply with respect to arbitration agreements. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). This distinction rests in significant part on the importance of explicit assent to arbitration, an assent that would not exist where an arbitration clause was being used to cover matters that arose with no CBA as a basis.

On the other hand, both the Supreme Court and our court have held that arbitration can be required with respect to matters that "arose under" the CBA. *Nolde Bros., Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243, 255, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977). The primary case on the delineation of this somewhat fuzzy boundary is *South Central Power Co. v. IBEW, Local Union 2359*, 186 F.3d 733 (6th Cir. 1999), where Judges Gilman and Keith, over one dissent, held that where "a majority of the material facts and occurrences under consideration arose" under the CBA, then an arbitration clause will be enforced, even after the CBA's expiration. *Id.* at 740. Thus, we must decide whether the relevant circumstances can be limited to the management's assessment of, and reasonable fear of, the possibility of future liability from Elliott's actions, or whether we should instead look to all of the underlying circumstances, including especially the precipitating incident itself. We hold that in this case, where no actions bearing on Elliott's fitness for work, nor the justness of his discharge, occurred independently after the expiration of the CBA, the arbitration clause will be enforced.

In our case, Elliott never returned to work. Thus, the company had no basis for any additional adverse judgment on his suitability for employment. Nor did the company become aware of any new facts pertaining to his suitability, such as, for example, altercations in which he was involved since his termination. This is quite different from the precedent on which the company relies, *Chrysler Motors Corp. v. Allied Industrial Workers*, 2 F.3d 760 (7th Cir. 1993). In *Chrysler*, a simultaneous reinstatement and firing, as occurred here, was held not to be contemptuous, where the company had "fresh evidence" to justify the second discharge. *Id.* at 764. Here there was no fresh evidence.

Instead, the company simply relied on, in essence, its previous judgment as to the nature and fault of Elliott's actions. Elliott argued that his actions were justified, or at least not reprehensible, because of the danger and commotion posed by the other worker. The management had a different view, and it was successful in persuading the Ohio Unemployment Compensation Board of Review of this view. However, the parties had bargained for the arbitrator's judgment as to these matters, and had agreed that the arbitrator's judgment would be binding. Federal law establishes a very strong presumption in favor of arbitration, and the upholding of arbitration judgments. *See United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). The fact that the company, or even a separate governmental body in parallel proceedings, comes to a different judgment does not alter the validity of the arbitrator's award.

At most, the company's current argument is that the same conduct upon which it relied to "discipline" Elliott by terminating him also justifies terminating him based on the

company's assessment that it might be subject to liability should he again commit unprovoked violence.

However, this argument is circular. The crux of the company's case for the second termination is exactly the same as its case for the first termination: that Elliott was the aggressor in a situation that did not justify the degree of force that he used. The arbitrator having come to a different conclusion, the company cannot simply repackage the same judgment as an independent and superseding reason for termination.

If it were otherwise, virtually every ground on which a company could rely for termination (misbehavior, tardiness, inefficiency) could be similarly repackaged as just cause for termination based on the company's prediction that a worker would repeat the conduct that the company believed occurred, though the arbitrator found that the conduct either did not occur or was not sufficiently serious to justify a termination.

Our decision in *South Central* upheld an arbitration under an expired CBA under circumstances that were considerably less connected with the original termination than in our case. In *South Central,* there had not been an initial arbitration. Instead, certain matters had been contested for the first time subsequent to the expiration of the CBA, though relying in part on activities that occurred under the CBA. The ultimate basis for the firing there was a final refusal of the worker to relocate, as arguably required by the now-expired CBA. Our court nevertheless found that where even a majority, let alone all, of the relevant circumstances had occurred during the time of the CBA, the arbitration clause would be enforced. This precedent is, of course, binding upon us and the factual circumstances of our case present an even more compelling occasion for the application of this principle.

IV

We therefore REVERSE the judgment of the district court and REMAND for that court to enter an order requiring arbitration of this dispute in accordance with the expired CBA.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-97-172
Consolidated with C-3-97-194

[Filed November 15, 2000]

TEAMSTERS LOCAL NO. 957, Plaintiff,	)
-vs-	)
DAYTON NEWSPAPERS, INC., Defendant.	)

DECISION AND ORDER

These cases are before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957 v. Dayton Newspapers, Inc.*, 190 F. 3d 434 (6th Cir. 1999). The Circuit Court reversed this Court's decision vacating an arbitrator's award which ordered that Dayton Newspapers, Inc., reinstate Rick Elliott. It remanded the case, stating:

> The court below failed to rule on two issues on the ground that its vacation of the arbitration award rendered the issues moot. DNI stated in its complaint that the arbitrator's award was not properly reduced by "amounts received elsewhere," as required by the CBA. The Union contended in its complaint that DNI's refusal to arbitrate its dispute with the Union regarding Elliott's second termination for being an "unacceptable liability risk" was a breach of DNI's obligations under the DNI [sic. Should be CBA]. Since we hold that the vacation of the arbitration award was improper, this consolidated matter is remanded so that the court below can determine whether (1) the arbitrator's award was properly not reduced by "amounts received elsewhere," and (2) DNI's refusal to arbitrate its dispute with the Union regarding Elliott's second termination for being an "unacceptable liability risk" was a breach of DNI's obligations under the collective bargaining agreement. This case is REVERSED and REMANDED for further proceedings consistent with this opinion.

190 F. 3d at 439.

Following remand, each party has filed a supplemental memorandum on the issues remaining undecided (Doc. ##27, 28). The parties are referred to hereinafter as the "Union" and "DNI."

With respect to the reduction of the award for "amounts received elsewhere," the Union concedes that the arbitrator's award must be so reduced (Doc. #27). The amount of the reduction is, of course, not a matter for the Court, but rather for the arbitrator. Accordingly, it is hereby ORDERED that the parties submit the issue of the amount of required

reduction of the back pay award to arbitration not later than December 15, 2000. Mindful that compliance with the orders of this Court in this and other litigation between these two parties has not always been as prompt as is appropriate, the Court advises counsel that the only way either party may avoid this submission is to obtain a modification of this order on motion.

The second issue unresolved by the Court's prior decision is contested. The Union contends that DNI is obliged to submit its second termination of Mr. Elliott to arbitration under the same collective bargaining agreement ("CBA") which governed the first termination and under which he was awarded reinstatement. DNI responds that the CBA in question has terminated and its obligation to arbitrate does not survive that termination.

There is no dispute of the material fact that the CBA expired in December, 1996. Mr. Elliott's second termination, based on the assessment of DNI's in-house counsel that he was an "unacceptable liability risk" to DNI, was made in January, 1997, after expiration of the CBA. The Union asserts that the position from which he was terminated is still within the bargaining unit and still covered by the just cause provision of the CBA (Doc. #27, p. 6). It's position seems to be that the just cause provision has survived expiration of the CBA, but it does not state how this could be.

DNI's Memorandum offers an extended analysis of when a duty to arbitrate survives termination of an agreement. In *Nolde Brothers, Inc., v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), the Supreme Court held that a duty to arbitrate is strongly presumed to survive if it relates to a grievance which arises under the contract. In *Litton Financial Printing Division v.*

NLRB, 501 U.S. 190 (1991), the Court explained what it means to "arise under the contract":

> A post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

501 U.S. at 205-206. In *South Central Power Co. v. International Brotherhood of Electrical Workers, Local Union 2359*, 186 F. 3d 733 (6th Cir. 1999), the court particularized the *Litton* test by holding that a dispute arises under the contract when a majority of the material facts and occurrences happened before expiration.

Mr. Elliott' s second termination occurred because he was found to be an unacceptable liability risk. The only fact upon which this assessment could have turned which occurred before expiration was his act of assaulting Iris Thomas, his former girlfriend. The termination itself happened after expiration. However, any risk of liability would have been as to future events. In other words, Iris Thomas was not suing DNI because Elliott had assaulted her and indeed terminating him would not prevent any such suit. Rather, DNI believed Elliott's behavior was likely to be repeated in the future with Iris Thomas or others, giving rise to liability for such future events. (See Brett Thurman Affidavit, ¶5). Because DNI at that point in time knew that Elliott was capable of assault on a fellow employee, a subordinate with whom he had engaged in what was apparently a sexual relationship, it might reasonably fear a negligent retention claim in the future.

The Court accordingly concludes that DNI was not obliged to submit the second termination of Mr. Elliott to arbitration.

November 14, 2000.

/s/ _____
Michael R. Merz
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-97-172
Consolidated with C-3-97-194

[Filed January 4, 2001]

GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 957, Plaintiff,	)
-vs-	)
DAYTON NEWSPAPERS, INC., Defendant.	)

DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT

This case is before the Court on Plaintiff's Motion to Alter or Amend the Judgment (Doc. No. 57). Having carefully considered the matter, the Motion is DENIED.

The issue on remand which the Court was required to decide was whether, "DNI's refusal to arbitrate its dispute with the Union regarding Elliott's second termination for

being an "unacceptable liability risk" was a breach of DNI's obligations under the collective bargaining agreement." 190 F. 3d at 439. As the Court hoped it had made clear, what the employer did after expiration of the collective bargaining agreement was to determine it no longer wished to employ Mr. Elliott, based on the fact that he had a demonstrated tendency to engage in assaultive behavior on a fellow employee which could result in the future in a further assault (on someone other than the person he fought with in the past) which would in turn generate an "unacceptable liability risk." In other words, it was a management assessment of future risk, not punishment for past behavior. It is correct that the sole apparent factual basis for the decision was the incident involving Iris Thomas which was the subject of the prior grievance, suit, and appeal. But this Court's decision on remand in no way "overrules" or attempts to overrule the Court of Appeals or the arbitrator. Mr. Elliott is entitled to reinstatement from the date of original termination until the second termination and back pay for the entire period. But he is not entitled to keep in perpetuity a job based on rights under the collective bargaining agreement after it expires. By analogy, if the collective bargaining agreement had continued and their had been a promotion available which under the contract was to be determined on the basis of seniority, and Mr. Elliott was next in seniority order, DNI would not have been able to deny him the promotion because of the fight he had been in. But assuming the same promotional opportunity but no CBA, there would be nothing to prevent DNI from deciding not to promote on the basis of the past incident. The employer is not required to ignore past conduct in determining staffing for the future. Once the CBA has expired, it is not liable to the grievance procedures with respect to that staffing.

In light of the foregoing ruling, DNI's Motion to Amend to seek a general declaration of the rights and duties of the parties (Doc. No. 57), opposed by the Union (Doc. No. 59) is denied as moot.

January 4, 2001.

/s/_____
Michael R. Merz
United States Magistrate Judge